Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

KAREN HOWSAM, individually and as Trustee for the E. Richard Howsam, Jr. Irrevocable Life Insurance Trust dated May 14, 1982,

Petitioner,

v.

DEAN WITTER REYNOLDS, INC., a Delaware corporation,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The parties agreed to arbitrate "all controversies" between them arising out of the petitioner's securities accounts with respondent, including "the construction . . . of this or any other agreement between" them.

The question presented is whether a court or the arbitrators should decide if claims are eligible for arbitration under a self-regulatory organization's arbitration code provision that "[n]o dispute, claim, or controversy shall be eligible for submission to arbitration under this Code where six (6) years have elapsed from the occurrence or event giving rise to the act or dispute, claim or controversy."

THE PARTIES

The parties are all listed in the caption of this case. Petitioner is not a corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Karen Howsam, individually and as Trustee for the E. Richard Howsam, Jr. Irrevocable Life Insurance Trust dated May 14, 1982 ("Howsam"), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The district court's order (Walker, D.J.), dated June 28, 1999, granting petitioner's motion to dismiss for lack of subject matter jurisdiction is unpublished. It is reprinted for purposes of this petition in the Appendix ("App.") at App. 31-36. The judgment entered by the district court as a result of the June 28, 1999, order is reprinted at App. 37-38. The opinion of the court of appeals is published at 261 F.3d 956 and reprinted for purposes of this petition at App. 1-30.

STATEMENT OF JURISDICTION

The court of appeals' opinion and judgment was entered August 9, 2001. Petitioner did not petition for rehearing or for rehearing *en banc* prior to filing this petition. 10th Cir. R. 35.1(B). Pursuant to Sup. Ct. R. 13.1, this petition is filed within 90 days of entry of judgment.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND ARBITRATION CODE PROVISIONS INVOLVED IN THIS CASE

(1) The United States Federal Arbitration Act, 9 U.S.C. § 1, *et seq.*, specifically, § 2, provides,

> A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

(2) Section 10304 of the NASD Code of Arbitration Procedure, Time Limitation Upon Submission, provides:

> No dispute, claim, or controversy shall be eligible for submission to arbitration under this Code where six (6) years have elapsed from the occurrence or event giving rise to the act or dispute, claim or controversy. This Rule shall not extend applicable statutes of limitations, nor shall it apply to any case which is directed to arbitration by a court of competent jurisdiction.

(3) Section 10324 of the NASD Code of Arbitration Procedure, Interpretation of Provisions of Code and Enforcement of Arbitrator Rulings, provides:

> The arbitrators shall be empowered to interpret and determine the applicability of all provisions under this Code and to take appropriate action to obtain compliance with any ruling by the arbitrator(s). Such interpretations and actions to obtain compliance shall be final and binding upon the parties.

STATEMENT OF THE CASE

After her husband's death in 1986, Howsam opened securities accounts with Dean Witter Reynolds, Inc. ("DWR") for herself and for a family trust. DWR and its registered representative purchased a number of limited partnerships for the accounts at a total cost of about $550,000. The partnerships were represented to Howsam to be long term investments which would provide income and growth in value for five to ten year periods, after which either the partnerships would have sold their properties or Howsam would sell her partnership interests. Through March 1992, the partnerships were valued on monthly account statements at their purchase costs. After March 1992, the partnerships were not valued at all on the account statements, but DWR's registered representative repeatedly assured Howsam that they continued to be good and valuable investments.

In late 1994, Howsam began to receive correspondence from the partnerships alerting her to the fact that they had suffered serious losses in value since their purchases in 1986. Howsam subsequently closed the DWR accounts.

The DWR customer agreement Howsam signed in 1992 contained an arbitration clause, requiring her to arbitrate disputes with DWR. In March 1997, Howsam commenced arbitration by filing a statement of claim alleging breaches of fiduciary duties by DWR and its registered representatives with the National Association of Securities Dealers, Inc. ("NASD"). The breaches included failure to recommend and sell Howsam investments which were suited to her and the trust's investment objectives, failure to advise Howsam that the investments were or had become unsuitable for her and the trust, and failure to monitor the investments and to keep Howsam apprised of their value so that she could make informed decisions with respect to their sale or retention prior to late 1994.

In July 1997, DWR filed a complaint in the district court seeking declaratory relief and to enjoin the arbitration from proceeding. DWR asserted jurisdiction under 28 U.S.C. §§ 1332(a)(1), 1391(b), and 2201. DWR contended that the events giving rise to the arbitration claims occurred more than six years prior to the commencement of arbitration, thus making them ineligible for arbitration pursuant to NASD Code of Arbitration Procedure (the "Code") § 10304.[1]

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[1] Effective July 1, 1996, the NASD initiated a new numbering system under which NASD Code § 15 was changed to NASD Code § 10304. The text of § 10304 is identical to the text of § 15, and, therefore, the case law interpreting § 15 applies equally to § 10304.

By order dated June 28, 1999, the district court granted Howsam's motion to dismiss DWR's complaint for lack of subject matter jurisdiction, holding that the eligibility issues presented by DWR's complaint must be determined by the arbitrators rather than the court. The district court found that the operative agreement to arbitrate was contained in an August 1992 Client Service Agreement (the "1992 Agreement") which provided, in relevant part,

> The Client agrees that all controversies between the Client and Dean Witter . . . concerning or arising from (i) any account maintained with Dean Witter by the Client; (ii) any transaction involving Dean Witter and the Client . . . ; or (iii) the construction, performance or breach of this or any other agreement between us . . . shall be determined by arbitration . . . .

The 1992 Agreement further provided that it was governed by the law of the State of New York. Relying on *Smith Barney Shearson Inc. v. Sacharow*, 689 N.E.2d 884 (N.Y. 1997), and *Cogswell v. Merrill Lynch, Pierce, Fenner & Smith*, 78 F.3d 474 (10th Cir. 1996), the district court determined that "the totality of this broad language [the arbitration provision of the 1992 Agreement] clearly and unmistakably evidences the parties' intention to have *all* disputed issues, including those of eligibility of arbitration pursuant to Section [10304], arbitrated and not judicially determined." App. 34 (emphasis in the original).

The court of appeals reversed, concluding that "the district court erred in finding that the parties 'clearly and unmistakably' agreed to allow an arbitrator, rather than

the courts, to decide whether specific disputes are arbitrable." App. 2.

In *Cogswell*, in which the Tenth Circuit had earlier held that courts rather than arbitrators should decide § 10304 eligibility issues, the court specifically stated that because the customer agreement was to be "construed in accordance with the laws of the State of New York," it applied New York's "principles of contract interpretation to determine the meaning of the agreement," *id.* at 478, citing *First Options of Chicago v. Kaplan*, 514 U.S. 938 (1995). After *Cogswell* was decided, the highest court in New York decided *Sacharow*, in which it held that an arbitration clause virtually identical to that contained in Howsam's 1992 Agreement clearly and unmistakably evidenced the parties' intent to submit § 10304 eligibility issues to the arbitrators.

The 1992 Agreement contained a provision that it was to be "construed and enforced in accordance with the laws of the State of New York." Nevertheless, the court of appeals rejected Howsam's contention that it should follow New York's construction of the arbitration clause, holding that the Federal Arbitration Act, 9 U.S.C. § 2, and related case law, created "a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." App. 20 (citation omitted).

The court of appeals recognized "that the circuit courts of appeals are almost evenly divided on the issue of whether the limitations period set forth in NASD Code

§ 10304 is a substantive eligibility requirement, or jurisdictional prerequisite to arbitration, which must be determined in the first instance by the courts." App. 28.

REASONS FOR GRANTING THE WRIT

I. The Court Should Resolve the Conflict Among the Circuits Over Whether the Courts or Arbitrators Determine Eligibility Under NASD Code § 10304 and Similar Provisions

The issue of whether courts or arbitrators should decide eligibility for arbitration under § 10304 of the NASD Code has been the subject of numerous conflicting rulings from various state and federal courts. Five federal circuits, including the Tenth Circuit, have determined that courts, not arbitrators, should decide the issue of § 10304 eligibility. *See, e.g., Painewebber, Inc. v. Hofmann*, 984 F.2d 1372 (3d Cir. 1993); *Dean Witter Reynolds, Inc. v. McCoy*, 995 F.2d 649 (6th Cir. 1993); *Edward D. Jones & Co. v. Sorrells*, 957 F.2d 509 (7th Cir. 1992); *Cogswell*; *Merrill Lynch, Pierce, Fenner & Smith v. Cohen*, 62 F.3d 381 (11th Cir. 1995).[2]

Five federal circuits have held to the contrary, holding that the decision is reserved for arbitrators. *See, e.g., Painewebber Inc. v. Elahi*, 87 F.3d 589 (1st Cir. 1996); *Paine-*

[2] *But see Dean Witter Reynolds, Inc. v. Fleury*, 138 F.3d 1339 (11th Cir. 1998) (upholding *Cohen*, but noting that in this case the broker's actions in filing responsive plea with arbitrators and arguing § 10304 issues with Director of Arbitration amounted to "clear and unmistakable evidence" of an intent to submit the issue to arbitration).

Webber Inc. v. Bybyk, 81 F.3d 1193 (2d Cir. 1996); *Smith Barney Shearson, Inc. v. Boone*, 47 F.3d 750 (5th Cir. 1995); *FSC Sec. Corp. v. Freel*, 14 F.3d 1310 (8th Cir. 1994); *O'Neel v. National Asso. of Sec. Dealers, Inc.*, 667 F.2d 804 (9th Cir. 1982).

State courts have similarly split on the question of whether courts or arbitrators should decide the question of § 10304 eligibility. *Accord, Cigna Fin. Advisors v. Rosen*, No. CV 94 0705235 (Conn. Super. Ct. Jan. 9, 1995), 1995 Conn. Super. LEXIS 74 (holding that courts decide eligibility question); *Citibank v. Crowell, Weedon & Co.*, 4 Cal. App. 4th 844 (Cal. App. 1992) (construing identical language in MSRB Arb. Code, rule G-35, Sec. 6, holding courts decide); *but see, Smith Barney, Inc. v. Keeney*, 570 N.W.2d 75 (Iowa 1997) (holding § 10304 issue is for arbitrators to determine); *Shahan v. Staley*, 188 Ariz. 74, 932 P.2d 1345 (Ariz. App. 1996) (to same effect).

To complicate matters further, the courts deciding these cases have reached their decisions using conflicting lines of reasoning. *Cf. Boone*, 47 F.3d at 753-54 (holding that § 10304 eligibility is arbitrability question, but is one of procedural rather than substantive arbitrability, thus determinable by the arbitrators), and *Elahi*, 87 F.3d at 599 (holding that § 10304 eligibility is presumptively not an arbitrability issue, unless parties clearly and unmistakably express an intent to make it thus). *Cf. also Freel*, 14 F.3d 1310 (basing its holding on the fact that § 10324[3]

[3] Pursuant to the July 1, 1996, new numbering system initiated by the NASD, NASD Code § 35 was changed to NASD Code § 10324. The text of § 10324 is identical to the text of § 35, and, therefore, the case law interpreting § 35 applies equally to § 10324.

unambiguously grants arbitrators power to decide all issues under code), and *Bybyk*, 81 F.3d 1193 (basing its holding on contract interpretation principles which call for courts to construe an ambiguous provision against the drafter).

II. Mandating Court Determination of § 10304 Eligibility Does Not Accord With Prior Holdings of This Court and Imposes a Wasteful Layer of Litigation on the Arbitration Process

This Court, in *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 649, 106 S. Ct. 1415, 1418-19 (1986) held that:

> the question of arbitrability – whether [an] . . . agreement creates a duty for the parties to arbitrate the particular grievance – is undeniably an issue for judicial determination. *Unless the parties clearly and unmistakably provide otherwise*, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator.

Emphasis added.

In *Volt Information Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 109 S. Ct. 1248 (1989), this Court confirmed the principles that: (1) state, not federal, law generally governs construction of arbitration agreements under the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* ("FAA"); (2) the FAA does not preempt the entire area of arbitration but only requires that arbitration proceed in the manner agreed to by the parties, including, where applicable, the parties' choice of state arbitration law; and (3) although ambiguities in arbitration agreements must be resolved in

favor of arbitration, the parties' intentions control and the courts' function is to enforce private arbitration agreements.

In *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57, 115 S. Ct. 1212, 1216 (1995), this Court reaffirmed its prior holding in *Volt* that under the FAA, arbitration agreements must be enforced according to their terms, even if such terms call for application of state arbitration law and that judicial construction of contracts is a matter of state law. In that same vein, this Court, in *First Options*, 514 U.S. 938 (1995), again affirmed the principle that arbitration agreements should generally be construed in accordance with state law principles of contract construction. "Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit." *Volt*, 489 U.S. at 479, 109 S. Ct. at 1256.

As a typical brokerage firm customer signing a typical pre-printed form brokerage firm agreement, Howsam agreed to arbitrate all claims and disputes arising out of the handling of her accounts by DWR. There is no dispute that Howsam's claims arise out of transactions in her accounts. There is a dispute over whether all or part of her claims are ineligible for arbitration before the NASD by virtue of § 10304 of its arbitration code.

Because the claims and disputes undeniably arise out of securities transactions in Howsam's account, they are arbitrable. Application of § 10304 is no different from application of statutes of limitation or statutes of repose, which courts have long held are appropriate matters for determination by arbitrators. Moreover, § 10324 grants

NASD arbitrators the power "to interpret and determine the applicability of all provisions under this Code . . . ."

Even if the parties had not expressly agreed to arbitrate such issues, the time considerations in § 10304 present issues of "procedural arbitrability" and are thus for the arbitrators to decide in accordance with this Court's holding in *John Wiley & Sons v. Livingston*, 376 U.S. 543, 84 S. Ct. 909 (1964).

The securities industry successfully advocated the right of brokers to compel customers who signed customer agreements containing arbitration clauses to arbitrate. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 105 S. Ct. 1238 (1985); *Shearson/American Express v. McMahon*, 482 U.S. 220, 107 S. Ct. 2332 (1987); *Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477, 109 S. Ct. 1917 (1989). As in Howsam's case, the arbitrations are conducted by industry-run self-regulatory organizations and exchanges.

Paradoxically, DWR and other brokerage firms now, in cases like Howsam's, frequently go to court to enjoin the arbitrations they have imposed on their customers. As the *Sacharow* court observed,

> Lastly, it would be ironic and anomalous to permit parties from the securities industry, who generally derive benefits from the arbitration method they impose on their thousands of consumers, to elude the comprehensive language of their own industry-drafted arbitration agreements. Having agreed to plenary arbitration, they should not garner that strategic advantage

> against their aggrieved or dissatisfied customers.

Id., 689 N.E.2d at 889.

Benefits of arbitration presumably include more efficient and less costly resolution of disputes. By seeking judicial determination of when "the occurrence or event giving rise to the act or dispute, claim or controversy" first occurred for purposes of applying § 10304, DWR and other brokers force their customers into court as defendants in order to delay arbitration and to increase the costs of bringing claims. Howsam asks this Court to draw a distinction between determination of whether a claim falls within the scope of controversies parties have agreed to arbitrate and determination of whether a claim is barred in whole or in part by § 10304 and similar arbitration rules. Determination of arbitrability is for the courts. Application of the six year rule contained in § 10304 should be for the arbitrators appointed to apply the NASD's Code to the controversies presented to them for resolution.

III. The Court of Appeals Disregarded This Court's Instructions By Refusing to Apply State Law In Construing the Parties' Arbitration Agreement

This Court has held that the ultimate question of arbitrability is based on the parties' intent, and that included in that intent may be a choice of law provision. "Arbitration under the [Federal Arbitration] Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit."

Volt, 489 U.S. at 479, 109 S. Ct. at 1256. Arbitration agreements must be enforced according to their terms, even if such terms call for application of state arbitration law. Judicial construction of contracts is a matter of state law. *Mastrobuono*, 514 U.S. at 57, 115 S. Ct. at 1216:

> This Court has confirmed the principles that: (1) state, not federal, law generally governs construction of arbitration agreements under the FAA; (2) the FAA does not preempt the entire area of arbitration but only requires that arbitration proceed in the manner agreed to by the parties, including, where applicable, the parties' choice of state arbitration law; and (3) although ambiguities in arbitration agreements must be resolved in favor of arbitration, the parties' intentions control and the courts' function is to enforce private arbitration agreements. *Volt*.

The 1992 Agreement provided that New York law applied. The customer agreement in *Cogswell* also contained a provision that it was to be construed in accordance with the laws of the State of New York. The Tenth Circuit followed the principles enunciated in *First Options* in its decision in *Cogswell* by expressly applying New York law as it existed before *Sacharow* was decided. In *Sacharow*, New York's highest court construed language virtually the same as that found in the 1992 Agreement, as clearly and unmistakenly expressing the parties' intent that the arbitrators decide whether claims are eligible for arbitration under § 10304. In this case, however, the court of appeals declined to apply New York's construction of the contract language, instead announcing that it was applying the "federal substantive law of arbitrability."

The Court should issue a writ of certiorari to determine whether the Tenth Circuit erred in applying its own interpretation in *Cogswell* to the facts of this case and in not applying the applicable New York state law of contract construction.

CONCLUSION

A writ of certiorari should issue to address the issues of law discussed above.

Dated: Denver, Colorado

November 6, 2001

Respectfully submitted,

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

DEAN WITTER REYNOLDS, INC., a Delaware Corporation, Plaintiff-Appellant,	)	
v.	)	No. 99-1320
KAREN HOWSAM, individually, and as Trustee for the E. Richard Howsam, Jr., Irrevocable Life Insurance Trust dated May 14, 1982, Defendant-Appellee.	)	(Filed Aug. 9, 2001)

Appeal from the United States District Court for the District of Colorado (D.C. No. 97-WM-1463)

Bradford D. Kaufman, Greenberg Traurig, P.A. (Joseph C. Coates, Greenberg Traurig, P.A., and Martin D. Litt, Holme Roberts & Owen LLP, with him on the briefs), West Palm Beach, Florida, for Plaintiff-Appellant.

Alan C. Friedberg, Pendleton, Friedberg, Wilson & Hennessey, P.C., Denver, Colorado, for Defendant-Appellee.

Before **EBEL** and **LUCERO**, Circuit Judges, and **VRATIL**,* District Judge.

EBEL, Circuit Judge.

Plaintiff-Appellant Dean Witter Reynolds, Inc. brought this action seeking to enjoin Respondent-Appellee Karen Howsam from arbitrating a dispute between Dean Witter and Howsam with the National Association of Securities Dealers ("NASD") on the ground that the dispute was time-barred under NASD rules. The district court concluded that the parties, in a 1992 ACCESS Client Service Agreement, had "clearly and unmistakably" agreed that all disputes between the parties, including questions regarding the arbitrability of those disputes, would be determined by an arbitrator rather than by the courts. The district court thus dismissed Dean Witter's cause of action. Exercising jurisdiction pursuant to 28 U.S.C. § 1291, we conclude that the district court erred in finding that the parties "clearly and unmistakably" agreed to allow an arbitrator, rather than the courts, to decide whether specific disputes are arbitrable. We therefore REVERSE the decision of the district court and REMAND for further proceedings.

---

* The Honorable Kathryn H. Vratil, United States District Judge for the District of Kansas, sitting by designation.

BACKGROUND

Karen Howsam ("Howsam") was a customer of Dean Witter Reynolds, Inc. ("Dean Witter") in March and April 1986, at which time she was advised by Dean Witter, through two of its brokers, Robert P. Howard and Paul J. Siler, to invest in a total of four limited partnerships. Howsam remained invested in those limited partnerships, allegedly due to the ongoing advice of Dean Witter, until late 1994, at which point she closed her Dean Witter accounts and moved her funds to another investment firm.

During the period when Howsam was a customer of Dean Witter, Howsam entered into a standard ACCESS Client Service Agreement ("1992 ACCESS Agreement"). The 1992 ACCESS Agreement, which was drafted by Dean Witter and signed by both Howsam and a Dean Witter representative, stated:

> The Client agrees that all controversies between the Client and Dean Witter and/or any of its officers, directors, or employees, present or former, concerning or arising from (i) any account maintained with Dean Witter by Client; (ii) any transaction involving Dean Witter and Client, whether or not such transaction occurred in such account or accounts; or (iii) the construction, performance or breach of this or any other agreement between us, whether such controversy arose prior to, on or subsequent to the date hereof, shall be determined by arbitration before any self-regulatory organization or exchange of which Dean Witter is a member. The Client may elect which of these arbitration forums shall hear the matter. . . .

Additionally, the 1992 ACCESS Agreement contained a provision specifying that the Agreement would be construed and enforced in accordance with New York state law "without reference to choice of law doctrine."

Pursuant to the terms of the 1992 ACCESS Agreement, on March 7, 1997, Howsam commenced an arbitration proceeding before the NASD regarding Dean Witter's recommendation that she invest in the four limited partnerships. Howsam filed an amended arbitration claim on April 10, 1997. In the amended claim, Howsam alleged that Dean Witter, through its agents Howard and Siler, made material misrepresentations about the investments prior to her decision to purchase them, and that the investments were unsuitable for someone with her investment needs. Howsam further alleged that Dean Witter, again through its agents, continued to inform her that the investments were sound, despite indications to the contrary, which impeded her understanding of the true nature of the investments until late 1994.

In order to commence the arbitration before the NASD, Howsam executed a Uniform Submission Agreement ("1997 Submission Agreement"), as required by the NASD. The 1997 Submission Agreement stated that Howsam agreed to submit her claims to the NASD with the understanding that the arbitration would be conducted in accordance with the rules and provisions of the NASD. Specifically, the 1997 Submission Agreement stated:

> 1. The undersigned parties hereby submit the present matter in controversy, as set forth in the attached statement of claim, . . . to arbitration in accordance with the Constitution, By-Laws, Rules, Regulations, and/or Code of Arbitration Procedure of the sponsoring organization.

The 1997 Submission Agreement contained another provision asserting, "The undersigned parties hereby state that they have read the procedures and rules of the sponsoring organization relating to arbitration." Although only Howsam signed the 1997 Submission Agreement, Dean Witter had effectively agreed to the 1997 Submission Agreement when, in the 1992 ACCESS Agreement, it gave Howsam the power to select the particular arbitration forum that would hear any dispute arising between the parties.

The NASD Code of Arbitration Procedure ("NASD Code") contains a provision stating that "[n]o dispute, claim or controversy shall be eligible for submission to arbitration under this Code where six (6) years have elapsed from the occurrence or event giving rise to the act or dispute, claim or controversy." *See* NASD Code § 10304 (formerly NASD Code § 15).[1] Based upon this provision in the NASD Code, Dean Witter (and co-defendant Howard, who was later dismissed from the lawsuit[2]) filed a

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[1] For purposes of clarity, we consistently refer to this provision by its current section number, "NASD Code § 10304," but note that several cases cited in this opinion refer to the provision by its prior section number, "NASD Code § 15."

[2] Dean Witter and Howard asserted diversity jurisdiction for purposes of establishing subject matter jurisdiction in the federal courts. Dean Witter was subsequently forced to dismiss Howard from the action in order to maintain complete diversity. The record does not indicate why Paul Siler, the other broker against whom Howsam brought claims in the NASD arbitration, was not a party to Dean Witter's federal lawsuit.

complaint in the United States District Court for the District of Colorado, requesting declaratory relief in the form of a court determination that Howsam's claims were untimely and thus non-arbitrable by the NASD, as well as an order enjoining the NASD arbitration proceeding pending resolution of Dean Witter's claim. Dean Witter asserted that the question of arbitrability of Howsam's claims was for the court, and not for NASD arbitrators, to decide.

In response, Howsam filed a "Motion to Dismiss for Lack of Jurisdiction" ("Motion"). In the Motion, Howsam argued that the district court lacked jurisdiction to decide the issue of arbitrability because the parties, in the form of the 1992 ACCESS Agreement, had agreed that all issues concerning or arising from Dean Witter's account-related services would be submitted to arbitration. Additionally, Howsam argued that the 1992 ACCESS Agreement's choice of law provision, which specified that New York state law would govern any dispute between the parties, required that NASD arbitrators, and not the district court, determine whether Howsam's claims were arbitrable because a claim's arbitrability under § 10304 of the NASD Code is a question reserved for arbitrators under New York state law.

Dean Witter countered by arguing that, because Howsam had not contested Dean Witter's asserted basis for subject matter jurisdiction (*i.e.*, diversity of citizenship), her Motion arguing that the court lacked jurisdiction and that the complaint should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(1) was effectively a motion to dismiss for failure to state a claim under Rule

12(b)(6). Because the Motion was more properly characterized as a motion to dismiss under Rule 12(b)(6), Dean Witter argued, the district court should not consider the 1992 ACCESS Agreement because it was not attached to or referenced in Dean Witter's complaint. Dean Witter further argued that, even if the court were to look to the 1992 ACCESS Agreement, it did not provide "clear and unmistakable" evidence that the parties agreed to submit the question of arbitrability to the chosen arbitration organization.

The district court granted Howsam's Motion on June 28, 1999. The district court analyzed the language of the 1992 ACCESS Agreement (without referencing the 1997 Submission Agreement) and concluded that its language provided "clear and unmistakable" evidence that the parties intended to submit all issues, including the issue of arbitrability, to the chosen arbitration body. *See Dean Witter Reynolds, Inc. v. Howsam*, No. 97-WM-1463, slip op. at 2-4 (D. Colo. June 28, 1999).

On appeal, Dean Witter argues, first, that the district court erred in looking to the 1992 ACCESS Agreement because Howsam's motion was, in effect, a motion to dismiss pursuant to Rule 12(b)(6) and, since Dean Witter never referenced the 1992 ACCESS Agreement in its complaint, the 1992 ACCESS Agreement was not properly before the court. Second, Dean Witter argues that, regardless of whether the 1992 ACCESS Agreement could potentially be reviewed by the court, that agreement was superceded by the 1997 Submission Agreement and thus was no longer the controlling agreement between the parties. Third, Dean Witter asserts that, even if we find the district court's review of the 1992 ACCESS Agreement

appropriate, that agreement does not "clearly and unmistakably" demonstrate that the parties agreed to have the question of arbitrability of any given dispute decided by an arbitrator rather than the courts.

DISCUSSION

1. Standard of Review

We have stated, "Because it is based on contract interpretation, arbitrability is a legal question . . . [that] we review de novo." *Cogswell v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 78 F.3d 474, 476 (10th Cir. 1996). District court determinations regarding subject matter jurisdiction are reviewed de novo. *See Hart v. Dep't of Labor ex rel. United States*, 116 F.3d 1338, 1339 (10th Cir. 1997). Because this appeal arises from a motion to dismiss, we accept all well-pleaded factual allegations in the complaint as true, and view them in the light most favorable to the non-moving party. *See Prager v. LaFaver*, 180 F.3d 1185, 1187 n.1 (10th Cir. 1999).

2. Analysis

a. The district court properly reviewed the 1992 ACCESS Agreement when deciding Howsam's motion to dismiss

Dean Witter argues that the district court erred in treating Howsam's Motion as a 12(b)(1) motion rather than a Rule 12(b)(6) motion. That distinction is important because the district court looked outside the confines of Dean Witter's complaint, *i.e.*, to the 1992 ACCESS Agreement, when deciding Howsam's Motion, and generally

courts should not look beyond the confines of the complaint itself when deciding a Rule 12(b)(6) motion to dismiss. Without deciding whether the district court erred in treating Howsam's motion as a Rule 12(b)(1) motion to dismiss for lack of jurisdiction, we hold that even if the district court had treated Howsam's Motion as a Rule 12(b)(6) motion to dismiss for failure to state a claim it still could have properly considered the language of the 1992 ACCESS Agreement. Therefore, any error that may have occurred when the district court characterized Howsam's motion as a Rule 12(b)(1) motion is harmless to this case.

It is permissible for a court to look beyond the four corners of the complaint when deciding a Rule 12(b)(1) motion to dismiss, *see Pringle v. United States*, 208 F.3d 1220, 1222 (10th Cir. 2000), but it is generally unacceptable for a court to do so when deciding a Rule 12(b)(6) motion to dismiss, *see Jackson v. Integra, Inc.*, 952 F.2d 1260, 1261 (10th Cir. 1991) (stating that a court "must examine only the plaintiff's complaint . . . [and] cannot review matters outside of the complaint" when deciding a Rule 12(b)(6) motion). If the court on a Rule 12(b)(6) motion looks to matters outside the complaint, the court generally must convert the Rule 12(b)(6) motion into a Rule 56 motion for summary judgment. *See* Fed. R. Civ. P. 12(c) ("If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in [Federal Rule of Civil Procedure] 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.").

It is debatable whether the district court erred in deciding Howsam's Motion under Rule 12(b)(1) rather than Rule 12(b)(6). We need not resolve that issue in this case, however, because the district court was justified in looking to the 1992 ACCESS Agreement in any event. It is accepted practice that, "if a plaintiff does not incorporate by reference or attach a document to its complaint, but the document is referred to in the complaint and is central to the plaintiff's claim, a defendant may submit an indisputably authentic copy to the court to be considered on a motion to dismiss." *GFF Corp. v. Associated Wholesale Grocers*, 130 F.3d 1381, 1384 (10th Cir. 1997); *see also Brooks v. Blue Cross & Blue Shield of Fla.*, 116 F.3d 1364, 1369 (11th Cir. 1997) ("[W]here the plaintiff refers to certain documents in the complaint and those documents are central to the plaintiff's claim, . . . the Court may consider the documents part of the pleadings for purposes of Rule 12(b)(6) dismissal, and the defendant's attaching such documents to the motion to dismiss will not require conversion of the motion into a motion for summary judgment.") (citing *Venture Assoc. Corp. v. Zenith Data Sys. Corp.*, 987 F.2d 429, 431 (7th Cir. 1993)). "If the rule were otherwise, a plaintiff with a deficient claim could survive a motion to dismiss simply by not attaching a dispositive document upon which the plaintiff relied." *See GFF*, 130 F.3d at 1385.

Dean Witter asserts that it did not reference the 1992 ACCESS Agreement in its complaint. We disagree. In its complaint, Dean Witter stated: "Dean Witter and Defendants are parties to an *arbitration agreement*. Consistent with *that agreement*, Defendants filed their Arbitration with the NASD." The parties have presented only two

arbitration agreements in this case: the 1992 ACCESS Agreement and the 1997 Submission Agreement. Thus, the reference by Dean Witter to an "arbitration agreement" must be to the 1992 ACCESS Agreement. The decision to commence arbitration before the NASD was "consistent" only with that agreement, which required Howsam to submit "all controversies" to arbitration by the NASD or another arbitration body of which Dean Witter was a member. The 1997 Submission Agreement, on the other hand, was part of the submission of Howsam's claims to the NASD and it would make little sense for Dean Witter to allege that the act of submitting the 1997 Submission Agreement was "consistent with" itself. In addition, the 1997 Submission Agreement is referenced by another name in the following paragraph. (*See* Complaint ¶ 9 ("At the time Defendants filed their Original Statement of Claim with the NASD, they *also* signed a *Uniform Submission Agreement*. . . . ") (emphasis added).) We therefore find that Dean Witter did reference the 1992 ACCESS Agreement, albeit minimally, in their initial filing with the district court.

The 1992 ACCESS Agreement was the arbitration agreement pursuant to which Howsam was obligated to submit her claims to binding arbitration by the NASD (or another arbitration association of which Dean Witter was a member), and was therefore clearly central – nigh indispensable – to deciding the parties' claims. Accordingly, Howsam brought the 1992 ACCESS Agreement to the district court's attention by discussing it in, and attaching it to, her motion to dismiss. Dean Witter has never argued that the copy of the 1992 ACCESS Agreement attached to Howsam's Motion was not a true and complete copy of

the original arbitration agreement between the parties. Under these circumstances, we think it would have defied common sense for the district court to ignore the 1992 ACCESS Agreement when rendering its decision in this case. *Cf. GFF*, 130 F.3d at 1385.

For the foregoing reasons, we find the district court's review of the 1992 ACCESS Agreement appropriate in this case, regardless of whether Howsam's motion was considered under Rule 12(b)(1) or Rule 12(b)(6).

b. The 1992 ACCESS Agreement, as supplemented by the 1997 Submission Agreement, is the operative agreement between the parties.

We are next asked to decide which is the operative arbitration agreement in this case, the 1992 ACCESS Agreement or the 1997 Submission Agreement. We find that the 1992 ACCESS Agreement, as supplemented by the 1997 Submission Agreement, is the controlling arbitration contract between the parties.

Dean Witter has argued that the 1997 Submission Agreement superceded the 1992 ACCESS Agreement, or, in the alternative, that the 1997 Submission Agreement modified the 1992 ACCESS Agreement, and thus that the district court erred in analyzing only the 1992 ACCESS Agreement when deciding Howsam's motion to dismiss. Dean Witter offers no convincing case law, however, to support its proposition that the 1997 Submission Agreement *superceded* the 1992 ACCESS Agreement. Instead, the cases cited by Dean Witter stand for the proposition that contract terms contained in an earlier arbitration agreement may be *supplemented* by later submission

agreements signed by the parties. *See, e.g., Executone Info. Sys., Inc. v. Davis*, 26 F.3d 1314, 1323 (5th Cir. 1994) ("It is well settled that the arbitrator's jurisdiction is defined by *both* the contract containing the arbitration clause and the submission agreement. If the parties go beyond their promise to arbitrate and actually submit an issue to the arbitrator, we look both to the contract *and* to the scope of the submissions to the arbitrator to determine the arbitrator's authority." (citations omitted) (emphasis added)); *Piggly Wiggly Operators' Warehouse, Inc. v. Piggly Wiggly Operators' Warehouse Indep. Truck Drivers' Union Local No. 1*, 611 F.2d 580, 583 (5th Cir. 1980) ("Before arbitration can actually proceed, it is necessary for the parties to *supplement* the agreement to arbitrate by defining the issue to be submitted to the arbitrator and by explicitly giving him authority to act." (emphasis added)).

When analyzing the parties' intent regarding the scope of the proposed arbitration, we must therefore look both to the original arbitration agreement, in which the parties have generally agreed to arbitrate issues arising from their association, and to the submission agreement, in which the issues to be arbitrated are precisely defined. This is the case so long as there is no express contradiction between the initial arbitration agreement and the submission agreement. *Cf. United Food and Commercial Workers, Local Union No. 7R v. Safeway Stores*, 889 F.2d 940, 946 (10th Cir. 1989) ("Extension of the arbitrator's authority through submissions is only allowed to the extent that the submission does not violate an express provision of the collective bargaining agreement.").

The extent to which an arbitration submission agreement may supplement an earlier, general agreement to

arbitrate was implicitly acknowledged in *Cogswell v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 78 F.3d 474 (10th Cir. 1996). The issue of which agreement controlled, *i.e.*, the earlier arbitration agreement signed by both parties or the later submission agreement signed only by the plaintiff, was not squarely addressed by the *Cogswell* court, presumably because the parties in *Cogswell* "agree[d] [that] their arbitration agreement incorporates the NASD Code, and that the agreement is to be 'construed in accordance with the laws of the State of New York.' " 78 F.3d at 478. Nevertheless, the *Cogswell* court's reliance on the initial arbitration agreement is evidenced by its recognition of the choice of law provision, which was contained only in the initial arbitration agreement entered into by both parties.[3] *See id.* at 475. Further, the *Cogswell* court's reliance on the subsequently filed submission agreement is evidenced by its statement that the parties' agreement incorporated the NASD Code, which was not referenced in the initial agreement but was specifically identified as the governing "Code of Arbitration" in the arbitration submission agreement signed by the plaintiff. *See id.* The court thus recognized that the earlier arbitration agreement had been supplemented by the submission agreement, at least to the extent that it identified the rules and regulations by which the plaintiff, through her election of the NASD as the arbitral body, agreed to be bound. Accordingly, we read *Cogswell* as recognizing that an arbitration submission agreement

[3] It is thus clear that the *Cogswell* court did not view the arbitration submission agreement as having *superceded* the previous signed arbitration agreement between the parties, as Dean Witter argues in this case.

may supplement a prior arbitration agreement entered into by the parties, even without evidence that the non-submitting party agreed to the express terms of the submission agreement, when the non-submitting party had earlier given authority to the submitting party to choose an arbitration forum, as well as that forum's rules and regulations, from among a list of approved arbitration organizations.

In this case, Howsam agreed in the 1992 ACCESS Agreement to choose an arbitration forum from a list of approved organizations should she choose to bring a claim against Dean Witter. In filing the 1997 Submission Agreement, Howsam elected to have her claims resolved by the NASD pursuant to NASD rules and regulations. Specifically, in signing the 1997 Submission Agreement, Howsam agreed to "submit the present matter in controversy, as set forth in the attached statement of claim, . . . to arbitration in accordance with the Constitution, By-Laws, Rules, Regulations, and/or Code of Arbitration Procedure of the sponsoring organization." There is no contradiction between the 1992 ACCESS Agreement and the 1997 Submission Agreement, such that the latter can plausibly be seen to supplement the former. *Cf. United Food*, 889 F.2d 940 at 947. We therefore conclude that both the 1992 ACCESS Agreement and the 1997 Submission Agreement apply in this case.

c. The 1992 ACCESS Agreement, as supplemented by the 1997 Submission Agreement, does not "clearly and unmistakably" demonstrate the parties' intent to have issues of arbitrability decided by an arbitrator rather than by the courts

1) Agreement must provide clear and unmistakable evidence of the parties' intent

The Supreme Court has stated that "arbitration is a matter of contract," and thus that parties should not be forced to arbitrate issues that have not been agreed upon. *See AT&T Tech., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 648 (1986) (interpreting an arbitration clause contained in a collective bargaining agreement). The Court has further stated that "[u]nless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate [a particular claim] is to be decided by the court, not the arbitrator." *Id.* at 649 (remanding the case to the district court to decide whether the collective bargaining agreement allowed arbitration of a particular labor dispute).

The Supreme Court explained the applicable standards in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), where it held that "[j]ust as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, so the question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about that matter." 514 U.S. at 943 (citations omitted). The *First Options* Court also noted, however, the particular difficulty in allowing arbitrators to decide the scope of their own jurisdiction:

> [T]he "who (primarily) should decide arbitrability" question . . . is rather arcane. A party often might not focus upon that question or upon the significance of having the arbitrators decide the scope of their own powers. And, given the principle that a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration, one can understand why courts might hesitate to interpret silence or ambiguity on the "who should decide arbitrability" point as giving the arbitrators that power, for doing so might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide.

Id. at 945 (citations omitted). Accordingly, the Court imposed a stringent test for the courts to apply in cases where the parties disagree over who should decide the arbitrability issue. Specifically, the Court stated: "Courts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." *Id.* at 944 (citing *AT&T*, 475 U.S. at 649) (alteration in original).

We adopted this standard in *Cogswell*, where we were asked to decide whether the district court or an arbitrator should determine whether an arbitration claim is barred under the time limit contained in NASD Code § 10304. *See* 78 F.3d at 476. The plaintiff in *Cogswell* commenced an arbitration proceeding with the NASD and then filed a motion to compel arbitration in the United States District Court for the District of Colorado. *See id.* at 475. In ruling on the plaintiff's motion, the district court concluded that the arbitrators, and not courts, should determine whether the limitations period set forth in NASD Code § 10304 bars an arbitration claim. *Id.* at 475-76.

On appeal we reversed, noting that courts in other jurisdictions were "sharply divided" on the issue, but that the majority of courts had concluded that courts, and not arbitrators, should determine whether an action is time-barred by the NASD Code because that determination involves the scope of the arbitrator's "subject matter jurisdiction." *See id.* at 476-77. After discussing the holdings of courts reaching a contrary conclusion, as well as the Supreme Court's recent decision in *First Options*, the *Cogswell* court adopted the majority view that the courts, and not arbitrators, should determine the arbitrability under NASD Code § 10304 of disputes submitted to arbitration, absent a "clear and unmistakable" agreement to the contrary. *See id.* at 481; *see also, e.g., Oil, Chemical, & Atomic Workers Int'l Union v. Conoco, Inc.*, 241 F.3d 1299, 1304 (10th Cir. 2001); *Riley Mfg. Co., Inc. v. Anchor Glass Container Corp.*, 157 F.3d 775, 779 (10th Cir. 1998).

In analyzing the specific language at issue in *Cogswell*, the court determined that the NASD Code provision at issue, stating that "[n]o dispute, claim or controversy shall be eligible for submission to arbitration under this Code where six (6) years have elapsed from the occurrence or event giving rise to the act or dispute, claim, or controversy," *see* NASD Code § 10304, " 'can reasonably be read in only one way – as a substantive limit on the claims that the parties have contracted to submit to arbitration.' " *See Cogswell*, 78 F.3d at 479 (quoting *PaineWebber, Inc. v. Hofmann*, 984 F.2d 1372, 1379 (3d. Cir. 1993)). We thus concluded that a reading of NASD Code § 10304 simply could not provide the type of "clear

and convincing" evidence that is required to allow arbitrators to decide the arbitrability of the parties' dispute.[4] *See id.* at 480-81. Based upon this finding, we concluded in *Cogswell* that "[§ 10304] of the NASD Code defines the arbitrators' substantive jurisdiction and [thus] that the courts, not the arbitrators themselves, must decide whether a claim is time-barred under that provision." *Id.* at 481.

2) New York State law does not govern the arbitrability issue

Howsam argues that this court's decision in *Cogswell* is not controlling because the 1992 ACCESS Agreement contains a provision specifying that New York state law governs any dispute between the parties, "without reference to choice of law doctrine." Howsam notes that, after the *Cogswell* decision was handed down on February 23, 1996, the New York Court of Appeals decided *Smith Barney Shearson, Inc. v. Sacharow*, 689 N.E.2d 884 (N.Y. 1997), in which it found that an arbitration agreement, which was substantially similar to the agreements at issue in this case, provided "clear and unmistakable" evidence that the parties intended to have the issue of

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[4] We also concluded that NASD Code § 10324 (formerly NASD Code § 35), which states that "arbitrators shall be empowered to interpret and determine the applicability of all provisions under [the NASD Code]," *see* NASD Code § 10324, did not provide "clear and unmistakable" evidence that the question of arbitrability should be decided by arbitrators rather than the courts. *See Cogswell*, 78 F.3d at 480-81.

arbitrability under NASD Code § 10304 decided by an arbitrator rather than the courts.[5]

Howsam is incorrect that the choice of law provision in the parties' 1992 ACCESS Agreement mandates that we follow New York state law rather [than] our own precedent. The Federal Arbitration Act, 9 U.S.C. §§ 1-16, which applies to all arbitration agreements "involving commerce," 9 U.S.C. § 2, "create[s] a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). "Federal law in the terms of the Arbitration Act governs that issue in either state or federal court." *Id.* As

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[5] In *Sacharow*, New York's highest court reviewed an arbitration agreement which stated that " '[a]ny controversy . . . shall be settled by arbitration' in accordance with the rules of the NASD Code," and which provided that all disputes would be governed by New York law. *See* 689 N.E.2d at 885. The *Sacharow* court acknowledged that arbitrability is ordinarily a question for the courts under New York law, but noted that "an . . . exception has evolved which recognizes, respects and enforces a commitment by the parties, nevertheless, to arbitrate even that issue when they 'clearly and unmistakably [so] provide.' " *Id.* at 887 (quoting *AT&T*, 475 U.S. at 649). Relying upon the Second Circuit's opinion in *PaineWebber, Inc. v. Bybyk*, 81 F.3d 1193, 1199 (2d Cir. 1996), the New York Court of Appeals held that the words "any and all controversies" were expansive enough to " 'encompass disputes over whether a claim is timely and whether a claim is within the scope of arbitration.' " *Sacharow*, 689 N.E.2d at 887 (quoting *Bybyk*, 81 F.3d at 1199). The court further noted that "the appropriate remedy for the party alleging a violation of [§ 10304] of the NASD Code 'is to defend the arbitration action on timeliness grounds, not to enjoin arbitration altogether.' " *Id.* (quoting *Bybyk*, 81 F.3d at 1200).

the First Circuit Court of Appeals stated in *PaineWebber, Inc. v. Elahi*, 87 F.3d 589 (1st Cir. 1996):

> Section 2 of the Federal Arbitration Act ("FAA"), "is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). Although "[t]he FAA contains no express pre-emptive provision," and "[does not] reflect a congressional intent to occupy the entire field of arbitration," *Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford, Jr. Univ.*, 489 U.S. 468, 477 (1989), it was intended to "create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Moses H. Cone*, 460 U.S. at 24.

87 F.3d at 593 (parallel citations omitted).

The *Elahi* court was faced with a choice of law provision in the arbitration agreement which, as in the case before us, provided that "this agreement and its enforcement shall be construed and governed by the laws of the State of New York." *See* 87 F.3d at 591. Despite this contractual language, the *Elahi* court held that the parties' choice of law provision did not control the issue of arbitrability. The court, quoting *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63-64 (1995), held:

> "We think the best way to harmonize the choice-of-law provision with the arbitration provision is to read 'the laws of the State of New York' to encompass substantive principles that New York courts would apply, but not to include special rules limiting the authority of arbitrators. Thus,

> the choice-of-law provision covers the rights and duties of the parties, while the arbitration clause covers arbitration. . . . "

Elahi, 87 F.3d at 594. Thus, the federal substantive law of arbitrability, rather than state law, must be applied when deciding whether the arbitration at issue was time-barred under the NASD Code.[6] *See id.* at 593 ("[T]he question whether a court or an arbitrator applies the [NASD § 10304] time bar relates closely to 'arbitrability,' so we must apply the federal common law of arbitrability that has developed pursuant to the FAA."); *cf. UHC Mgmt. Co. v. Computer Sci. Corp.*, 148 F.3d 992, 996 (8th Cir. 1998) ("A number of post-*Mastrobuono* cases have interpreted that decision as similarly rejecting the notion that a general state choice-of-law clause appended to a contract that also includes an arbitration provision will preempt the applicability of the FAA in a federal court proceeding." (citing *Ferro Corp. v. Garrison Indus., Inc.*, 142 F.3d 926, 936-38 (6th Cir. 1998)); *Gallus Inv., L.P. v. Pudgie's Famous Chicken, Ltd.*, 134 F.3d 231, 233 (4th Cir. 1998); *National Union Fire Ins. Co. v. Belco Petroleum Corp.*, 88 F.3d 129, 134-35 (2d Cir. 1996); *Elahi*, 87 F.3d at 594 & n. 5; *Atlantic Aviation, Inc. v. EBM Group, Inc.*, 11 F.3d 1276, 1280 (5th Cir. 1994)).

We have no doubt that the arbitration agreement in this case, which was intended to cover "all controversies" related to Dean Witter's provision of investment services to Howsam, "involve[d] commerce" as broadly defined

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[6] Indeed, the New York Court of Appeals in *Sacharow* reached the same conclusion regarding the effect of the FAA. *See* 689 N.E.2d at 889.

by the Supreme Court in *Allied-Bruce Terminix Co. v. Dobson*, 513 U.S. 265, 277 (1995) (concluding that the "word 'involving,' like 'affecting,' signals an intent to exercise Congress' commerce power to the full"). *See Elahi*, 87 F.3d at 593; *Merrill Lynch, Pierce, Fenner & Smith v. Masland*, 878 F. Supp. 710, 712 (M.D. Pa. 1995) (finding arbitration agreement stemming from the parties' investment services relationship to fall within the purview of the FAA notwithstanding a choice of law provision in the contract selecting New York law); *Dean Witter Reynolds, Inc. v. Daily*, 12 F. Supp. 2d 1319, 1322 (S.D. Fla. 1998) (same). Accordingly, we hold that the 1992 ACCESS Agreement, as supplemented by the 1997 Submission Agreement, is subject to the federal substantive law of arbitrability despite the choice of law provision contained in the 1992 ACCESS Agreement. *See Elahi*, 87 F.3d at 593; *Masland*, 878 F. Supp. at 712 ("[The FAA] creates a body of federal substantive law of arbitrability. . . . [T]o the extent that the contract purports to establish New York law as controlling the issue of arbitrability, the contract language is preempted by [the FAA]."); *Daily*, 12 F. Supp. 2d at 1322 ("There is no dispute that the Account Agreement is within the scope of the FAA because it is one clearly 'involving commerce.' Thus the Court finds that the Account Agreement is subject to federal arbitration law rather than New York law." (citation omitted)). On the arbitrability issue before us, then, we are not governed by how the New York Court of Appeals construed similar arbitrability language, but are governed instead by the

federal law of arbitrability, as that law has been established in the Tenth Circuit by *Cogswell*.[7]

3) Under this court's *Cogswell* decision, the parties' agreement does not provide "clear and unmistakable" evidence of the parties' intent to have the arbitrability issue resolved by an arbitrator rather than the courts.

Of course, the most "clear and unmistakable" agreement to arbitrate the issue of arbitrability would be an express statement to that effect in the parties' contractual agreement to arbitrate disputes arising between them. Indeed, the Supreme Court has stated that "silence or ambiguity about the question 'who (primarily) should decide arbitrability,' " *First Options*, 514 U.S. at 944, should not be viewed as giving the arbitrators that power, "for doing so might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide," *id.* at 945. Given the Supreme Court's stated disregard for "silence or ambiguity" in the contractual language, it seems entirely possible that an express statement in the contract is not only preferable, but necessary, to a finding that the parties "clearly and unmistakably" agreed to

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[7] Were we to address the merits of *Sacharow* 's analysis as to whether the parties had "clearly and unmistakably" agreed to submit the issue of arbitrability to the arbitrators rather than the courts, we would respectfully disagree with the *Sacharow* holding. We believe the *Sacharow* court gave insubstantial weight to the presumption established in *First Options* that parties to arbitration agreements generally intend arbitrability questions to be resolved by the courts.

submit arbitrability questions to an arbitrator rather than the courts. We need not resolve that issue, however, because the language contained in the 1992 ACCESS Agreement and 1997 Submission Agreement falls squarely within this court's previous holding in *Cogswell* and thus cannot, under *Cogswell*, provide "clear and unmistakable" evidence of the parties' intent.[8]

The *Cogswell* court focused on the language of relevant provisions in the NASD Code when it determined that the parties' agreement did not provide "clear and unmistakable" evidence of the parties intent regarding the arbitrability issue. The NASD Code language addressed by the *Cogswell* court is identical to the NASD Code language adopted in the 1997 Submission Agreement, such that *Cogswell* governs our interpretation of that language. In addition, even if we go beyond the NASD Code sections analyzed by the *Cogswell* court, the

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[8] We note that there is some confusion in the case law as to *which* language should be relied upon to decide whether the parties have "clearly and unmistakably" decided to arbitrate the issue of arbitrability. While some courts look to the language of the parties' contract, *see, e.g., Dean Witter Reynolds, Inc. v. Daily*, 12 F. Supp. 2d 1319, 1322 (S.D. Fla. 1998) (analyzing agreement regarding "all controversies . . . arising out of or concerning any such account, [or] any transactions . . . "), other courts look only at the relevant provisions in the NASD Code, *see, e.g., Cogswell*, 78 F.3d at 481; *Edward D. Jones & Co. v. Sorrells*, 957 F.2d 509, 512 (7th Cir. 1992) (analyzing the parties' intent by looking to the NASD Code). Regardless of which language this court considers in the instant case, however, *Cogswell* mandates a finding that arbitrability must here be determined by the court because the agreements between Howsam and Dean Witter did not "clearly and unmistakably" provide that the question of arbitrability should be resolved by an arbitrator.

language contained in the underlying arbitration agreements at issue in *Cogswell* is materially indistinguishable from the language of the 1992 ACCESS Agreement and 1997 Submission Agreement at issue in this case.

In *Cogswell*, the original arbitration agreement stated that the parties "agree[d] that any controversy arising out of [the client's] business or this Agreement shall be submitted to arbitration conducted according to the rules and procedures of the New York Stock Exchange, Inc. ("NYSE") or of the National Association of Securities Dealers, Inc. ("NASD") as [the client] may elect." *See Cogswell*, 78 F.3d at 475. Here, as noted above, the 1992 ACCESS Agreement stated:

> The Client agrees that all controversies between the Client and Dean Witter and/or any of its officers, directors, or employees, present or former, concerning or arising from (i) any account maintained with Dean Witter by Client; (ii) any transaction involving Dean Witter and Client, whether or not such transaction occurred in such account or accounts; or (iii) the construction, performance or breach of this or any other agreement between us, whether such controversy arose prior to, on or subsequent to the date hereof, shall be determined by arbitration. . . .

We find no material difference between the contractual language at issue in *Cogswell* and the relevant contractual language contained in the 1992 ACCESS Agreement.

Similarly, the uniform submission agreement signed by the *Cogswell* plaintiff when initiating the arbitration proceeding stated that the proceeding would be governed

by the "Constitution, By-Laws, Rules, Regulations and/or Code of Arbitration . . . of the [NASD]." *See id.* Here, the 1997 Submission Agreement stated: "The undersigned parties hereby submit the present matter in controversy, as set forth in the attached statement of claim, . . . to arbitration in accordance with the Constitution, By-Laws, Rules, Regulations, and/or Code of Arbitration Procedure of the sponsoring organization." Again, there is no material difference between the submission agreement at issue in *Cogswell* and the 1997 Submission Agreement at issue in the present case.

The only potentially material difference between the contractual language in *Cogswell* and the language at issue here is that the parties in this case also agreed in the 1992 ACCESS Agreement to "waiv[e] their right to seek remedies in court, including the right to a jury trial." This language played a substantial part in the district court's opinion below. *See Dean Witter Reynolds, Inc. v. Howsam*, No. 97-WM-1463, slip op. at 3-4 (D. Colo. June 28, 1999). We do not find it availing, however. At most, this language is ambiguous and therefore does not satisfy the *First Options* requirement of a "clear and unmistakable" intent by the parties to have the NASD § 10304 arbitrability issue decided by an arbitrator rather than a court. The language does not refer specifically to arbitrability, and it is unlikely that it was intended to state that Howsam could not in any circumstance resort to the courts. Such a literal reading of the provision would mean that Howsam had waived any ability to seek an order compelling arbitration, *see* 9 U.S.C. §§ 3, 4, or to seek judicial enforcement of an arbitration award, *see id.* § 9, or even to seek vacatur of the arbitrator's award if the arbitrator

exceeded his or her powers, *see id.* at § 10. Such a reading would essentially nullify Howsam's arbitration rights entirely, and yet if Howsam did not intend by this clause to waive all her rights to seek judicial assistance with the arbitration process, she can hardly argue that the clause "clearly and unmistakably" waives both parties' right to seek a judicial determination of arbitrability. The reference to a "jury trial," in particular, is peculiar, although it is perhaps a reference to the jury trial rights found in Section 4 of the FAA, *see* 9 U.S.C. § 4. Regardless of its exact meaning, the "jury trial" reference suggests a narrow scope to the clause, perhaps suggesting that issues that are arbitrable should be determined according to the remedies available in arbitration without resort to additional judicial remedies. Whatever it means, however, this clause is simply not a clear and unambiguous statement that courts should not be involved in the threshold arbitrability question at issue in this case.

We recognize that the circuit courts of appeals are almost evenly divided on the issue of whether the limitations period set forth in NASD Code § 10304 is a substantive eligibility requirement, or jurisdictional prerequisite to arbitration, which must be determined in the first instance by the courts. The Third, Sixth, Seventh, Tenth and Eleventh Circuits have all answered that question in the affirmative, while the First, Second, Fifth, Eighth and Ninth Circuits have all answered that question in the negative. *See Elahi*, 87 F.3d at 596-99 (collecting and discussing cases from other circuits). Ultimately, questions of arbitrability and who decides whether a particular claim is arbitrable are matters of the parties' intent. It therefore seems to this court that amendment by the

NASD and other arbitration forums of their rules and submission agreements to "clearly and unmistakably" resolve this issue one way or another is long overdue.[9] Until the arbitration organizations undertake such action, however, we are bound by the presumptions established in *First Options* and our own Tenth Circuit precedent in *Cogswell*.

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[9] We note that the NASD has proposed at least two amendments to § 10304 in the last seven years that would have resolved the "who decides arbitrability" question conclusively in favor of the NASD deciding whether a particular claim is time-barred under § 10304. *See* Self Regulatory Organizations, Notice of Filing of Amended Proposed Rule Change by National Association of Securities Dealers, Inc. Relating to the Eligibility of Disputes for Arbitration, 59 Fed. Reg. 39,373, at 39,373-74 (proposed July 26, 1994) (stating "the Director of Arbitration shall determine if the claim is eligible for submission to arbitration by determining if the claim alleges that less than six (6) years have elapsed between the occurrence or event giving rise to the dispute, claim or controversy and filing of the claim.") (withdrawn from SEC consideration in October 1994, *see Elahi*, 87 F.3d at 596 n.9); Self Regulatory Organizations, Notice of Filing of Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to the Eligibility of Claims for Arbitration, 63 Fed. Reg. 588, at 589 (proposed Jan. 6, 1998) (stating that the Director of Arbitration, if asked by one of the parties to decide eligibility under § 10304, will determine eligibility and that his decision is final and binding upon the parties) (not adopted as of January 2000, *see J.E. Liss & Co. v. Levin*, 201 F.3d 848, 851 (7th Cir. 2000)). It appears, however, either that the NASD has withdrawn, or that the Securities and Exchange Commission has refused to approve, the amendments to § 10304 proposed by the NASD over the last several years.

CONCLUSION

For the foregoing reasons, we REVERSE the decision of the district court and REMAND for further proceedings not inconsistent with this opinion.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Walker D. Miller

Civil Action No. 97-WM-1463

DEAN WITTER REYNOLDS, INC., a Delaware corporation,

Plaintiff,

v.

KAREN HOWSAM, individually and as Trustee for the E. Richard Howsam, Jr., irrevocable Life Insurance Trust Dated May 14, 1982.

Defendant.

ORDER

(Filed June 28, 1999)

Miller, Jr.

This matter is before the Court on Defendant's Motions to Amend Order Staying Arbitration, to Dismiss for Failure to Join an Indispensable Party and to Dismiss for Lack of Jurisdiction. This matter is also before the Court on Plaintiff's Motion to Exclude Matters Outside of the Pleadings. The court will address all pending motions collectively in this Order.

On August 31, 1998, Defendant filed a motion in this Court to Dismiss for Lack of Jurisdiction. The motion is premised on a 1997 decision by the Court of Appeals of New York that, while interpretation of Section 15 of the National Association of Securities Dealers (NASD) Code of Arbitration Procedure is a question of arbitrability, it is

a question to be decided by arbitrators, not courts. *In re Smith Barney Shearson Inc. v. Sacharow*, 666 N.Y.S.2d 990 (N.Y. 1997).

Section 15 (now denominated as Rule 10304) of the NASD Code states:

> No dispute, claim, or controversy shall be eligible for submission to arbitration under this Code where six (6) years have elapsed from the occurrence or event giving rise to the act or the dispute, claim or controversy. This Rule shall not extend applicable statutes of limitations, nor shall it apply to any case which is directed to arbitration by a court of competent jurisdiction.

The Defendant claims that this New York case is controlling in the instant case as a result of a specific provision contained in the ACCESS Client Service Agreement that Plaintiff and Defendant entered into in August of 1992. The provision states: "[t]his Agreement shall be construed and enforced in accordance with the laws of the state of New York without reference to choice of law doctrine." In light of the *Sacharow* decision and the governing law provision in the ACCESS agreement, it is Defendant's position that this Court lacks subject matter jurisdiction to decide the merits of this case.

Plaintiff contends the *Sacharow* decision does not trump the law of the Tenth Circuit, regardless of the parties' choice of law provision. Tenth Circuit law states the general rule that courts, not arbitrators, are to decide whether a claim is arbitrable under NASD Section 15. *Cogswell v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 78 F.3d 474 (10th Cir. 1996).

Although the parties view the two cases as contradictory, both cases recognize the same general rule and exception: Although the question of arbitrability is normally a question for the courts, not the arbitrators, the parties may, by clear and unmistakable language, provide otherwise. *See Cogswell*, 78 F.3d at 481 ("the issue . . . is whether the parties' agreement contains 'clear and unmistakable' evidence they intended the arbitrator to decide the issue [of whether § 15 applies]"); *Sacharow*, 666 N.Y.S.2d at 993 ("we note the well-settled proposition that the question of arbitrability is an issue generally for judicial determination in the first instance. . . . An important legal and practical exception has evolved which recognizes, respects and enforces a commitment by the parties, nevertheless, to arbitrate even that issue when they 'clearly and unmistakably [so] provide' ").

Accordingly, the issue before me is whether the parties, in the arbitration agreement, clearly and unmistakably agreed to submit all issues, including that of arbitrability, to the arbitrator for resolution.

The agreement provides:

> [t]he client agrees that *all controversies* between the Client and Dean Witter and or any of its officers, directors, or employees, present or former, concerning or arising from (i) *any account* maintained with Dean Witter by the Client; (ii) any transaction involving Dean Witter and the Client, whether or not such transaction occurred in such account or accounts; or (iii) the *construction*, performance or breach of this or any agreement between us, whether such controversy arose *prior to, or subsequent to the date hereof*, shall be determined by arbitration before any self-

> regulatory organization or exchange of which Dean Witter is a member.

Agreement, ¶ 19 (emphasis added). Like the arbitration provision at issue in *Sacharow*,[1] the parties here have agreed to arbitrate "all controversies" arising from their relationship. Importantly, the agreement also contains a key provision indicating they did not intend to leave recourse to judicial intervention: "The parties are waiving their right to seek remedies in court, including the right to a jury trial." *Id.* Despite Plaintiff's assertions to the contrary, the totality of this broad language clearly and unmistakably evidences the parties' intention to have *all* disputed issues, including those of eligibility of arbitration pursuant to Section 15, arbitrated and not judicially determined. Therefore, my determination that I lack subject matter jurisdiction to consider the section 15 issue is not contrary to *Cogswell*.

This action must be returned to the arbitration panel to determine whether or not Defendant Howsam's claim falls within the limitations set forth in NASD Code Section 15.

Plaintiff also argues that Defendant's motion is not properly brought under Rule 12(b)(1) and should be treated as a motion filed pursuant to Rule 12(b)(6). I disagree. Defendant in her motion is merely asserting that, pursuant to the agreement entered into by the parties, an arbitration panel rather than this Court has the

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[1] Plaintiff asserts that the language in the ACCESS agreement is not as broad as that in *Sacharow* and that there is no evidence that the parties in this case intended to have eligibility disputes determined through arbitration. I conclude otherwise.

jurisdiction to decide whether or not Defendant's claims are arbitrable under NASD Section 15.

"A court is required to convert a Rule 12(b)(1) motion to dismiss into a Rule 12(b)(6) motion or a Rule 56 summary judgment motion when resolution of the jurisdictional question is intertwined with the merits of the case." *Holt v. United States*, 45 F.3d 1000, 1003 (10th Cir. 1995). Defendant, in her motion, is only challenging this Court's authority to decide the merits of the case. The jurisdictional question, *i.e. who* (courts or arbitrators) has the jurisdiction to decide eligibility, is wholly separate from the decision as to *whether* the claims are eligible for arbitration. Defendant's motion is properly brought under Rule 12(b)(1), and this Court will not convert it into a motion to dismiss under Rule 12(b)(6) or a motion for summary judgment under Rule 56. Accordingly, this Court is free to consider the ACCESS agreement drafted by Dean Witter and signed by both parties in reviewing Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction.

Accordingly, it is ordered:

1. Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction (#30) is granted.

2. Defendant's Motion to Dismiss for Failure to Join an Indispensable Party (#14) is denied as moot.

3. Plaintiff's Motion to Exclude Matters Outside the Pleadings (#34) is denied as moot.

4. Defendant's Motion to Amend Order Staying Arbitration (#10) is denied as moot.

5. The Status Conference set for July 1, 1999, at 2:00 p.m. is vacated.

6. This matter shall be dismissed with prejudice.

DATED this 25th day of June, 1999.

BY THE COURT:

/s/ Walker D. Miller
Walker D. Miller
United States
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Walker D. Miller

CERTIFICATE OF MAILING

Civil Action No. 97-WM-1463

Copies of this Order were served by (*) delivery; or (**) depositing the same in the United States mail, postage prepaid, addressed to the persons listed below.

Lisa S. Casey*
Home [sic] Roberts & Owen LLP
D.C. Box 7

Alan Friedberg**
303 E. 17th Ave.
Suite 1000
Denver, CO 80203

Magistrate Judge Patricia A. Coan

Dated: June 25, 1999

/s/ [Illegible]
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Walker D. Miller

Civil Action No. 97-WM-1463

DEAN WITTER REYNOLDS, INC.,
a Delaware corporation,

Plaintiff,

v.

KAREN HOWSAM, individually and as Trustee
for the E. Richard Howsam, Jr.,
Irrevocable Life Insurance Trust
Dated May 14, 1982,

Defendant.

FINAL JUDGMENT

(Filed June 28, 1999)

In accordance with orders filed during the pendency of this case, and pursuant to Fed. R. Civ. P. 58(2), the following FINAL JUDGMENT is hereby entered.

Pursuant to the written Order filed by Judge Walker D. Miller on June 28, 1999, judgment is entered as follows:

1. Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction (#30) is granted.

2. Defendant's Motion to Dismiss for Failure to Join an Indispensable Party (#14) is denied as moot.

3. Plaintiff's Motion to Exclude Matters Outside the Pleadings (#34) is denied as moot.

4. Defendant's Motion to Amend Order Staying Arbitration (#10) is denied as moot.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Walker D. Miller

CERTIFICATE OF MAILING

Civil Action No. 97-WM-1463

Copies of this Final Judgment, signed by Chief Deputy Clerk Stephen P. Ehrlich on June 28, 1999, were served by (*) delivery; or (**) depositing the same in the United States mail, postage prepaid, addressed to the persons listed below.

Lisa S. Casey*
Holme Roberts & Owen LLP
D.C. Box 7

Alan Friedberg**
303 E. 17th Ave.
Suite 1000
Denver, CO 80203

Magistrate Judge Patricia A. Coan

Dated: June 28, 1999 /s/ Stephen P. Ehrlich
Deputy Clerk